IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

THE LASIK VISION INSTITUTE, LLC

Plaintiff,

vs. **CASE NO: 4:17-cv-00958**

BRUCE E. JANUARY, M.D.,
LCA-VISION, INC. d/b/a/ LasikPlus,
VISION ACQUISITION LLC d/b/a LasikPlus,
and JOFFE MN P.C. d/b/a Joffe MediCenter

Defendants.
______________________________________/

COMPLAINT FOR INJUNCTIVE RELIEF AND DAMAGES

Plaintiff, THE LASIK VISION INSTITUTE, LLC ("Plaintiff," or "the Company"), sues Defendants, BRUCE E. JANUARY, M.D. ("January"), LCA-VISION, INC. d/b/a LasikPlus ("LCA-Vision"), VISION ACQUISITION LLC d/b/a LasikPlus ("Vision Acquisition"), and JOFFE MN, P.C. d/b/a Joffe MediCenter ("Joffe"), and alleges:

PARTIES, JURISDICTION AND VENUE

1. This is an action for injunctive relief and damages, court costs, and attorneys' fees.

2. Plaintiff Lasik Vision Institute LLC is a Delaware limited liability company that is authorized to do and does conduct business in the state of Texas. Plaintiff is successor by conversion to the Lasik Vision Institute, LLC, a Florida limited liability company. The sole member of Plaintiff is a citizen of the state of Florida.

3. Defendant Bruce E. January, M.D. is an individual, *sui juris*, who is a citizen of the state of Texas and who upon information and belief resides in Houston, Texas.

4. January's address for service of process is 5457 Sugar Hill, Houston, Texas 77056, his usual place of residence, Alternatively he can be served with process at Defendant Joffe MediCenter at 5420 West Loop S #4200, Bellaire, Texas 77401 or at Defendant LCA-Vision at 3700 Buffalo Speedway #325, Houston, Texas 77098, his usual place of business, or wherever else he may be found.

5. Defendant LCA-Vision is a Delaware corporation that is conducting business in the state of Texas, including in Houston, San Antonio and McAllen.

6. LCA-Vision's registered agent for service of process is Corporation Search Company d/b/a CSC-Lawyers Incorporating Service Company, 211 E. 7th Street, Suite 620, Austin, Texas 78701 or wherever else it may be served.

7. Vision Acquisition is a Delaware limited liability company that does business in the state of Texas, including a location at 3700 Buffalo Speedway #325, Houston, TX 77098 or wherever else it may be served.

8. Joffe is a Delaware limited liability company. Joffe is conducting business under the name of "Joffe MediCenter" with a location at 5420 West Loop S #4200, Bellaire, Texas 77401. Upon information and belief, Joffe's registered agent for service of process is Corporation Service Company d/b/a CSC-Lawyers Incorporating Service Company, 211 E. 7th Street, Suite 620, Austin, Texas 78701. Joffe also has a registered agent in Delaware: Corporation Service Company, 2711 Centerville Road, Suite 400, Wilmington, Delaware 19808 or wherever else it may be served.

9. Vision Acquisition are doing business in the State of Texas and committing the torts recited in this Complaint. Under the Texas Long Arm Statute, Sec. 17.041 et sec of the Tex. Civ. Prac. & Rem. Code, The Texas Secretary of State is an agent for service of process on

Vision Acquisition since they do business in this state but have not named a resident agent for service of process and have committed torts in this state.

10. This Court has jurisdiction pursuant to 28 U.S.C. § 1331, as Plaintiff alleges claims of federal questions, including claims arising under the Defend Trade Secrets Act, 18 U.S.C. 1836. This Court has supplemental jurisdiction over the remaining state law claims under 28 U.S.C. § 1367.

11. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b), as at least one Defendant resides in this District, and the causes of action alleged herein, including tort and contract claims, accrued in this District and pursuant to 28 U.S.C. § 124.

FACTUAL BACKGROUND

January and Plaintiff

12. Plaintiff is a leading provider of direct-to-consumer LASIK vision eye surgery (commonly known as refractive vision surgery) in the United States, both in terms of volume and in terms of the number of locations or "centers".

13. Plaintiff, through its recruitment and training of experienced and qualified surgeons, optometrists, technicians and other center personnel provides LASIK and other related pre-operative and post-operative procedures nationwide on a daily basis.

14. Plaintiff is also involved in the research and development of other areas of surgical and specialty procedures related to vision and eye treatment.

15. Plaintiff owns numerous registered trademarks, including the incontestable trademark Registration No. 3,179,001 for "THE LASIK VISION INSTITUTE"® (the "Plaintiff Mark"),

16. Plaintiff has spent considerable time and resources in developing and promoting the Plaintiff Mark and in becoming the leading US provider of the services described above.

17. By virtue of Plaintiff's significant and ongoing use, as well as specialized marketing, advertising and promotion, the Plaintiff Mark is well-known and uniquely associated with the Plaintiff in the minds of consumers.

18. The Plaintiff's Mark has acquired extremely valuable goodwill and a secondary meaning, such that it has become symbolic for the high quality, direct-to-consumer services provided by Plaintiff.

19. In 2002, Plaintiff engaged January to work as a physician/surgeon in its centers in Texas.

20. January began performing surgical procedures for Plaintiff in 2003.

21. From 2003 to September 12, 2016, January worked as a surgeon for Plaintiff's Lasik Vision refractive eye surgery centers in Texas (Houston, San Antonio, McAllen), New Mexico (Albuquerque), Kansas (Overland Park, Topeka) and Georgia (Atlanta).

22. At various times during that nearly fifteen-year period, January and Plaintiff operated under certain physician services agreements ("PSA") and management services agreements ("MSA"), which agreements governed the parties' respective rights and obligations. True and correct copies of the various agreements are attached hereto as Composite Exhibit "A."

23. Defendant January's Houston Management Services Agreement dated November 2, 2006, ("the Houston MSA") included a confidentiality covenant. In the Houston MSA, Plaintiff is referred to as "Manager." The Houston MSA provides at 11(a):

> (ii) [January] covenants … (i) at any time either during or subsequent to the Term, [he] shall not, without Manager's written consent, disclose to others, use, copy or permit to be copied the confidential information of Manager and its affiliates, or disclose this Agreement or any of the terms hereof, except in pursuance of [his] obligations under this Agreement or except as otherwise required by law; (ii) promptly return upon the expiration or earlier termination of this Agreement for any reason, [he] shall return to

> Manager, originals or copies of all reports, records, memoranda and other materials that contain the confidential information of Manager and its affiliates, including originals and copies of all such reports, records, memoranda and other materials …. (iii) "Confidential Information of a Party, as used herein, shall mean information of a confidential and/or proprietary nature to that Party, or any of its members or affiliates, regardless of whether specifically identified as "confidential," and shall include marketing plans, business plans, feasibility studies, financial, accounting and statistical data, price and cost information, policies and procedures, and treatment methods….

24. All prior MSAs and PSAs executed by January over the course of his nearly fifteen-year relationship included the same or similar confidentiality covenants.

25. Defendant January's Atlanta Professional Services Agreement dated April 17, 2014 ("the Atlanta PSA") included a non-competition provision which provides:

> **Article XXX Physician's Additional Covenants**
>
> (a). During the Term and for a period of one (1) year thereafter…Physician…will not do…without the express prior written consent of Company…
>
> (a)(i) "Engage, directly or indirectly in any activity which is in competition with Company within a ten (10) mile radius of any of the Locations, including, but not limited to, contacting, communicating with, or associating with any Patient for whom Company has previously rendered Professional Services (whether rendered by Physician or by any other party), is currently attempting to render Professional Services, or who is on any patient list of Company and regardless of whether such engagement is as an officer, director, proprietor, employee, partner, investor or owner (other than as a holder of less than five percent (5%) of the outstanding capital stock of a publicly traded corporation), consultant, advisor, agent or otherwise."

26. The main distinction between the selection of a PSA instead of a MSA is that certain states have restrictions on what is commonly referred to as the corporate practice of medicine. In the states that have such restrictions (such as Texas), the MSA is the operative agreement with the surgeon. In states that have no such restriction (such as Atlanta), the PSA is the operative agreement with the surgeon.

27. Defendant January is in violation of the Houston MSA, the San Antonio MSA, the McAllen MSA and the Atlanta PSA as described in further detail below.

28. As part of his affiliation with Plaintiff (and in consideration for his agreement to maintain confidentiality), January was provided with confidential and proprietary information of Plaintiff including trade secrets of Plaintiff, and was furthermore provided with specialized training to assist him in his position as surgeon/physician at Plaintiff centers.

29. During the course of his fifteen-year affiliation with Plaintiff, Defendant January had unfettered access to Plaintiff’s trade secrets and other confidential business information, not only related to surgical techniques and practices, but other business and marketing strategy that is unique to Plaintiff.

30. Additionally, as a former member of Plaintiff's Medical Review Board, Defendant January was entrusted with access to Plaintiff's trade secrets and other confidential and proprietary information, including, but not limited to, the selection, implementation and improvements of proprietary technologies, the selection, implementation and improvements of proprietary surgical procedures and equipment, surgical success and failure rates and other information to which only certain select and trusted individuals would have access or privilege.

31. Additionally, Defendant January had access to specialized scheduling and tracking software implementations utilized by Plaintiff in maintaining its competitive edge.

32. In keeping with its efforts to maintain the secrecy of its data, Plaintiff’s trade secrets and other confidential and proprietary information are kept on its server in a restricted area with limited access and otherwise not available to the public.

33. Plaintiff’s trade secrets/confidential and proprietary information includes, but is not limited to, the following:

a) customer data;
b) general operation/execution data (e.g., Plaintiff's safety manuals, employee and hiring manuals, proprietary and authentically created procedures detailing pre-operative and post-operative techniques);
c) surgical standard operating procedures;
d) other proprietary surgical and medically-sound procedures and processes;
e) strategic sales initiatives and marketing strategies;
f) in-development plans and strategies for growth and continued success; and
g) other trade secrets/confidential business information.

34. Defendant January's long-term relationship with Plaintiff, and in consideration of his execution of multiple confidentiality agreements, gave him this unfettered access to the trade secrets/confidential and proprietary information and strategy for Plaintiff covering both the short and long term growth strategy, technical superiority, and goals and plans for the Company's continued success and competition.

35. On or about September 12, 2016, Plaintiff separated its affiliation with Defendant January, due to his inappropriate and unprofessional conduct.

LCA-Vision, Vision Acquisition and Joffe Hired January in Texas and Georgia

36. Upon separation from Plaintiff, January became affiliated with LCA-Vision/Vision Acquisition and Joffe, direct competitors of Plaintiff.

37. Defendant January's affiliation with LCA-Vision/Vision Acquisition and Joffe have been advertised by both companies and on January's own social media outlets.

38. LCA-Vision/Vision Acquisition competes with Plaintiff in Houston, San Antonio and McAllen, Texas,

39. LCA-Vision/Vision Acquisition also competes with Plaintiff within a 10-mile radius in Atlanta, Georgia and all across the United States.

40. LCA-Vision/Vision Acquisition and Joffe are related entities in that both are owned and controlled by Joffe family interests.

41. Upon separation from Plaintiff, Defendant January took confidential and proprietary information of Plaintiff.

42. Plaintiff has a legitimate belief that Defendant January's affiliation with LCA-Vision/Vision Acquisition and Joffe constitutes a threatened misappropriation of its trade secrets and other confidential business information or will result in an inevitable disclosure to Plaintiff's competitors – Defendant January's co-Defendants.

43. Upon information and belief, January has disclosed Plaintiff's confidential and proprietary information to LCA-Vision/Vision Acquisition and Joffe, in violation of the Houston MSA and the various other confidentiality agreements executed by Defendant January in favor of Plaintiff.

44. Defendant January's affiliation with Vision Acquisition and Joffe in Atlanta is a violation of the Atlanta PSA.

45. As of the date of this filing, LasikPlus and Joffe are advertising Defendant January as a physician in its Texas facilities in Houston, San Antonio and Atlanta.

46. In fact, Joffe's website made false and misleading statements comparing the services of LVI and Joffe. See **"Composite Exhibit "B".**

47. Joffe is also engaging in unfair competitive tactics by using certain metatags and keywords redirecting internet searches of LVI by consumers to Joffe's website.

48. Plaintiff has satisfied all conditions precedent to the maintenance of this action.

COUNT I – DEFEND TRADE SECRETS ACT

49. Plaintiff realleges and reincorporates paragraphs 1 through 48 above as if fully set forth herein.

50. This is a claim for an injunction, damages, attorneys' fees and seizure under

Defend of Trade Secrets Act (DTSA), 18 U.S.C.§1836.

51. Defendants have wrongfully and willfully misappropriated Plaintiff's trade secrets.

52. As a result of Defendants' actual or threatened misappropriation, Plaintiff has been damaged.

53. In a civil action brought under DTSA with respect to the misappropriation of a trade secret, this Court may enter injunctive relief to prevent any actual or threatened misappropriation of Plaintiff's trade secrets on such terms as the court deems reasonable, and if determined appropriate by this Court, requiring affirmative actions to be taken to protect the trade secret; and, if there are exceptional circumstances that render an injunction inequitable, the Court may issue an injunction against Defendants that conditions future use of Plaintiff's trade secrets upon payment of a reasonable royalty for no longer than the period of time for which such use could have been prohibited.

54. Injunctive relief is appropriate under the circumstances.

55. Plaintiff also seeks damages for actual loss caused by the misappropriation of its trade secrets and damages for any unjust enrichment caused by the Defendants' misappropriation of the trade secrets that is not addressed in computing damages for actual loss; or in lieu of damages measured by any other methods, the damages caused by the misappropriation measured by imposition of liability for a reasonable royalty for the Defendants misappropriators' unauthorized disclosure or use of Plaintiff's trade secrets.

56. As the Defendants have willfully and maliciously misappropriated Plaintiff's trade secrets, Plaintiff requests that the Court also award exemplary damages in an amount not more than 2 times the amount of the damages awarded above and award Plaintiff its reasonable

attorney's fees.

WHEREFORE, Plaintiff respectfully requests that this Court grant injunctive relief, damages (including exemplary damages and/or royalties), attorneys' fees and all other relief (including seizure upon proper pleading and proof) that this Court deems just and proper.

COUNT II - THEFT / MISAPPROPRIATION OF TRADE SECRETS – AGAINST JANUARY, LCA-VISION, VISION ACQUISITION and JOFFE

57. Plaintiff realleges and reincorporates paragraphs 1 through 56 above as if fully set forth herein.

58. Defendant January's actions in stealing, copying, and/or communicating or transmitting Plaintiff's trade secrets constitute violations of Article 31.05 of the Texas Penal Code.

59. Defendant January is working with and for LCA-Vision, Vision Acquisition and Joffe, all having access to Plaintiff's misappropriated proprietary information.

60. Not only is this a blatant theft of Plaintiff's confidential and proprietary information, but it opens the door to LCA-Vision, Vision Acquisition and Joffe, destroying a major competitive advantage of Plaintiff by illegal or improper means.

61. As such, Defendants' actions give rise to liability to Plaintiff under Texas Civil Practice & Remedies Code § 134.001, the Texas Theft Liability Act.

62. Plaintiff therefore seeks to recover its damages as provided by the Texas Theft Liability Act, including but not limited to its actual damages, attorney's fees and costs, and exemplary damages.

63. As a direct result of Defendants' actions as described above, Plaintiff has and continues to suffer injuries and damages including loss of business revenue, loss of profit, and loss of reputation. Plaintiff accordingly seeks to recover damages, including exemplary damages

as allowed by law, in this suit in an amount within the jurisdictional limits of this Court.

64. Plaintiff seeks recovery of all necessary attorneys' fees in connection with the preparation and trial of this cause, under the authority of Texas Civil Practice & Remedies Code §38.001, *et seq*., and for further reasonable attorneys' fees in the event this case is appealed.

65. Plaintiff additionally petitions this Court under the authority of Chapter 65 of the Texas Civil Practice & Remedies Code, and Section 15.51 of the Texas Business & Commerce Code. Plaintiff accordingly respectfully requests that this Court issue relief in the way of a Preliminary Injunction to enjoin all Defendants from using Plaintiff's confidential and proprietary information and trade secrets in competition with Plaintiff, or otherwise violating the above-referenced confidentiality agreements.

66. In support of its request, Plaintiff can and will show that it meets the requirements for the granting of injunctive relief, as follows:

a. Plaintiff has a cause of action against Defendants;
b. Plaintiff has a probable right to the relief sought; and
c. Plaintiff will suffer a probable, imminent, and irreparable injury in the interim, if injunctive relief is not granted in the form of a Temporary Restraining Order, and subsequent Temporary Injunction.

67. More specifically, as alleged above, Plaintiff has a cause of action against Defendant January and for, *inter alia*, breach of confidentiality agreements, misappropriation of trade secrets, and civil conspiracy. Plaintiff also has causes of action against LCA-Vision, Vision Acquisition and Joffe for misappropriation of trade secrets, civil conspiracy, and for tortious interference with valid contracts. Furthermore, Plaintiff has a probable right to recover under each of these causes of action.

68. If injunctive relief is not granted, Plaintiff will suffer a probable, imminent and irreparable injury in the interim because Defendants will continue to use Plaintiff's confidential,

proprietary information, including its trade secrets, against Plaintiff in direct competition with Plaintiff.

69. There is no adequate remedy at law for Plaintiff.

70. Therefore, the Court should grant Plaintiff the requested injunctive relief, enjoining Defendants, from using, transmitting or disseminating any confidential, proprietary information of Plaintiff, including but not limited to any trade secrets of Plaintiff.

WHEREFORE, Plaintiff respectfully requests that this Court enter a judgment in its favor for actual damages, exemplary damages, costs and attorneys' fees against all Defendants, injunctive relief against all Defendants and for such other and further relief that this Court deems just and proper under the circumstances.

COUNT III - BREACH OF CONFIDENTIALITY AGREEMENTS – AGAINST JANUARY

71. Plaintiff realleges and reincorporates paragraphs 1 through 70 above as if fully set forth herein.

72. Defendant January signed valid, enforceable confidentiality/non-disclosure agreements with Plaintiff (See **Composite Exhibit "A"**).

73. Defendant January has breached his non-disclosure agreements by disclosing and furnishing confidential, proprietary and trade secret information to LCA-Vision, Vision Acquisition and Joffe.

74. As a result of Defendant January's breach, Plaintiff sustained damages.

75. Plaintiff accordingly seeks to recover those damages in an amount within the jurisdictional limit of this Court.

WHEREFORE, Plaintiff respectfully requests that this Court enter a judgment in its favor for damages, costs and attorneys' fees against Defendant January and for such other and further relief that this Court deems just and proper under the circumstances.

COUNT IV - TORTIOUS INTERFERENCE AGAINST LCA-VISION, VISION ACQUISITION AND JOFFE

76. Plaintiff realleges and reincorporates paragraphs 1 through 75 above as if fully set forth herein.

77. LCA-Vision, Vision Acquisition and Joffe are liable to Plaintiff for their tortious interference with the contracts between Plaintiff and January.

78. There are existing contracts between Plaintiff and Defendant January that were subject to interference (See **Composite Exhibit "A"**).

79. LCA-Vision, Vision Acquisition and Joffe willfully and intentionally interfered with the contracts.

80. LCA-Vision, Vision Acquisition and Joffe proximately caused Plaintiff actual damage and loss.

WHEREFORE, Plaintiff respectfully requests that this Court enter a judgment in its favor for actual damages, exemplary damages, costs against LCA-Vision, Vision Acquisition and Joffe and for such other and further relief that this Court deems just and proper under the circumstances.

COUNT V - CIVIL CONSPIRACY – ALL DEFENDANTS

81. Plaintiff realleges and reincorporates paragraphs 1 through 80 above as if fully set forth herein.

82. LCA-Vision, Vision Acquisition and Joffe conspired with Defendant January to cause January to breach his contractual duties to Plaintiff, steal Plaintiff's trade secrets.

83. Plaintiff has sustained damages as a result of this civil conspiracy.

84. Plaintiff seeks to recover those damages, as well as exemplary damages as

allowed by law.

WHEREFORE, Plaintiff respectfully requests that this Court enter a judgment in its favor for actual damages, exemplary damages, costs and attorneys' fees against all Defendants and for such other and further relief that this Court deems just and proper under the circumstances.

COUNT VI - FALSE ADVERTISING CLAIM
UNDER THE FEDERAL LANHAM ACT – AGAINST JOFFE

85. Plaintiff realleges and reincorporates Paragraphs 1 through 84 above as if fully set forth herein.

86. In commercial advertising and promotions, Joffe has misrepresented the characteristics of its and Plaintiff's services concerning Plaintiff. See **Composite Exhibit "B".**

87. Joffe's misrepresentations actually deceived or had the capacity to mislead and deceive a substantial segment of potential consumers.

88. Joffe's statements were material misrepresentations in that they were likely to influence consumers' purchasing decisions.

89. Plaintiff's services are in interstate commerce.

90. Plaintiff has been injured as a result of Joffe's misrepresentations.

WHEREFORE, Plaintiff respectfully requests that this Court enter a judgment in its favor for actual damages, exemplary damages, costs and attorneys' fees against all Defendants, injunctive relief against all Defendants and for such other and further relief that this Court deems just and proper under the circumstances.

COUNT VIII - BREACH OF NON-COMPETITION AGREEMENT – AGAINST JANUARY

91. Plaintiff realleges and reincorporates paragraphs 1 through 90 above as if fully set forth herein.

92. Defendant January signed a valid, enforceable non-competition agreement with Plaintiff in the Atlanta PSA.

93. Defendant January has breached his non-competition agreements working for LCA-Vision, Vision Acquisition and Joffe within a ten (10) mile radius of Plaintiff 's Location as defined in the Atlanta PSA.

94. Pursuant to the Atlanta PSA, Plaintiff is entitled to injunctive relief.

95. As a result of Defendant January's breach, Plaintiff sustained damages and Defendant January has gained profits.

96. Plaintiff accordingly seeks to recover those damages and profits in an amount within the jurisdictional limit of this Court.

WHEREFORE, Plaintiff respectfully requests that this Court enter a judgment in its favor for injunctive relief, including a provision that orders the Atlanta MSA to restart the one year non-competition period, damages, profits costs and attorneys' fees against January and for such other and further relief that this Court deems just and proper under the circumstances. In the alternative, Plaintiff respectfully requests that this Court enter a judgment for the above including a finding of breach and entitlement to injunctive relief which Plaintiff may domesticate and enforce in the courts of the state of Georgia.

Respectfully Submitted,

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